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No. 80-2048

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1981

MATSON PLASTERING CO., INC.
Petitioner

VS.

OPERATIVE PLASTERERS AND CEMENT MASONS
INTERNATIONAL ASSOCIATION AFL-CIO
PLASTERERS LOCAL UNION No. 295
Respondents.

MATSON PLASTERING CO., INC.
Petitioner

VS.

LATHERS LOCAL UNION L-109, AND DEAN PUTHUFF,
Respondents.

REPLY BRIEF TO MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

THE NINTH CIRCUIT COURT OF APPEALS COMMITTED LEGAL ERROR IN HOLDING THAT THE DISTRICT COURT HAD NO JURISDICTION TO DETERMINE WHETHER THE PARTIES INTENDED TO EXCLUDE THE UNDERLYING DISPUTE FROM THE ARBITRATION PROCEDURES AND NO-STRIKE CLAUSE OF THE COLLECTIVE BARGAINING AGREEMENTS

Respondents' claim within their Opposition Brief that the Ninth Circuit Court of Appeals' Opinion (see, Appendix "B" to the Petition) provides that both the Lathers and Plasterers' collective bargaining agreements expressly exempt the underlying dispute from the arbitration procedures and no-strike provisions.[1] However, Respondents' characterization of the Ninth Circuit Court of Appeals' decision is clearly erroneous.

The Ninth Circuit Court of Appeals' Opinion does not make any determination whatsoever as to whether the

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[1]At page 6 of its Memorandum In Opposition To Petition For Writ Of Certiorari, Respondents state: "Consistent with the principles expressed above, the Court properly concluded that the parties had expressed an intent to permit the union to take economic action." At page 7 of its Memorandum In Opposition To Petition For Writ Of Certiorari, Respondents state: "Under the principles expressed above, no injunction was permissible under the Lathers' agreement because of the parties expressed intent to remove the no-strike obligation and/or the grievance procedure precisely the dispute which arose in this case." Also, at page 7, Respondents state: "Here with respect to both the Lathers and Plasterers the collective bargaining agreement either exempted the dispute from the grievance procedure or expressly permitted the union to take strike action."

parties intended to exclude the underlying dispute from the arbitration procedures and no-strike provisions of the respective collective bargaining agreements. On the contrary, the Ninth Circuit Court of Appeals never reached that issue regarding the parties' intent. Instead, the Ninth Circuit adopted a rule that the District Court loses jurisdiction to determine that issue whenever the union *disputes* whether its strike is over an arbitrable issue (regardless of the fact that the union fails to file any affidavits or present any evidence in support of its position).[2]

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[2]As was stated by the Ninth Circuit Court of Appeals: "*Boys Market* carved out a narrow exception to the structures [against the issuance of injunctions in cases involving or growing out of labor disputes]. It overruled prior case law . . . and held that the Norris-La Guardia Act did not prohibit an injunction to enforce an *undisputed* contractual obligation not to strike and to submit to binding arbitration. Absent such a clear contractual duty, *Boys Market* leaves the strictures of the Norris-La Guardia Act undisputed." [At page A-5 of Appendix "B" to the Petition; emphasis added].

"Most importantly, the Court held that in a *Buffalo Forge* type case a District Court may not issue an injunction pending the arbitrator's decision where it is *not clear* whether the strike is over an arbitrable issue and is in direct violation of a no-strike clause." [At page A-7 of Appendix "B" to the Petition; emphasis added].

"Equally true under *Buffalo Forge* is that where it is *not clear* that the strike is over an arbitrable issue and is in violation of a no-strike clause, the District Court has no jurisdiction to enjoin strike activity pending the arbitrator's decision." [At page A-7 of Appendix "B" to the Petition; emphasis added].

Based on the above, the Ninth Circuit ruled that the District Court lacked jurisdiction to determine whether the parties intended to exclude the underlying dispute from the arbitration procedures solely because the union "disputed" whether the underlying grievance was subject to the mandatory arbitration procedures, and regardless of the fact that the union failed to file any affidavits or submit any evidence in support of its position.

The Ninth Circuit Court of Appeals' holding is clearly erroneous. Both *Boys Market v. Retail Clerks' Union Local 770* (1970) 398 U.S. 325, and *Buffalo Forge Co. v. United Steel Workers of America, AFL-CIO,* 428 U.S. 397 (1976) hold that a District Court retains jurisdiction to enjoin a strike if the underlying dispute falls within the arbitration provisions of the collective bargaining agreement. Yet, the Ninth Circuit Court of Appeals' decision precludes the District Court from making that very determination.

At pages 3-7 of its Memorandum In Opposition To Petition For Writ Of Certiorari, Respondents set forth a number of provisions of the collective bargaining agreements in an effort to convince this Honorable Court that the parties intended to exclude the underlying dispute from the arbitration procedures.[3] However, this Honorable Court

[3]Appendix "G" to the Petition contains an inadvertent printing error. Therein, the first paragraph of Section 2 of Article XIII is erroneously omitted. Attached hereto as "Amended Appendix G" is a corrected copy of Article XIII of the Plasterers' collective bargaining agreement, including the first paragraph of Section 2 thereof.

At page 5 of its Memorandum In Opposition To Petition For Writ Of Certiorari, Respondents cite paragraph 3 of Article XIII, Section 2 of the Plasterers' collective bargaining agreement in support of their argument that the parties intended to exclude the underlying dispute from the arbitration procedures. However Respondents have never before relied on paragraph 3 of Article XIII, Section 2, (either before the District Court or the Ninth Circuit Court of Appeals). Rather, Respondents previously relied upon paragraph 1, Article XIII, Section 2 of the Plasterers' collective bargaining agreement. [See, Appendix "K" attached hereto, which is a copy of page 5 of Respondents' Opening Brief to the Ninth Circuit Court of Appeals, wherein Respondents argued to the Ninth Circuit Court of Appeals that paragraph 1 of Article XIII, Section 2 exempted the instant dispute from mandatory arbitration.] Respondents should not now be allowed to rely on paragraph 3 of Article XIII, Section 1 of the Plasterers' collective bargaining agreement for the first time.

need *not* consider said arguments cited at pages 3-7 of Respondents' Memorandum In Opposition To Petition For Writ Of Certiorari. The issue presented for review herein is not whether the parties intended to exclude the underlying dispute from arbitration, but rather, whether the Ninth Circuit Court of Appeals committed legal error in holding that the District Court was without jurisdiction to consider that very issue.[4] Petitioner therefore asks this Honorable Court to first rule that *the District Court had jurisdiction to determine that issue,* and then to remand the case back to the Ninth Circuit Court of Appeals if this Honorable Court believes the District Court's determination of that issue requires review.

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[4]At pages 1 and 2 of its Memorandum In Opposition To Petition For Writ Of Certiorari, Respondents claim that the issues presented for review are (1) "Whether strikes which are arguably in violation of a no-strike clause contained in a collective bargaining agreement are enjoinable under the rule established by *Boys Market v. Retail Clerks Union Local 770,* 398 U.S. 235 (1970)", and (2) "Whether parties to a collective bargaining agreement may exempt from the no-strike obligation and/or the grievance procedure specific disputes, so as to preclude the exercise of jurisdiction by a District Court to enjoin a strike." Respondents have simply misstated the issues. The Ninth Circuit Court of Appeal did not make any determination as to whether the unions' strike was in violation of a no-strike clause, and/or whether the parties may or may not exempt specific disputes from the no-strike obligation and/or grievance procedures. Rather, the Ninth Circuit Court of Appeal merely held that the District Court lacks jurisdiction to determine whether the strike is over an arbitrable issue whenever the union "*disputes*" whether the underlying grievance falls within a no-strike clause and/or arbitration clause of a collective bargaining agreement.

II

THE DISTRICT COURT DID NOT FAIL TO FOLLOW THE PROCEDURAL REQUIREMENTS OF THE NORRIS-LA GUARDIA ACT

At page 8 of its Memorandum In Opposition To Petition For Writ Of Certiorari, Respondents argue that the District Court failed to hold an evidentiary hearing, and failed to make any findings of fact or conclusions of law prior to the issuance of the injunctive decree. However, it is well settled that where an evidentiary hearing is useless, then such a hearing is not necessary. [*Amalgamated Transit Union Div., 1384 v. Greyhound Lines, Inc.* (1976) 529 F.2d 1073; vacated and remanded on other grounds (1976) 429 U.S. 807, reversed on other grounds (9th Cir., 1977) 550 F.2d 1237; *Hoh v. Pepsi Co., Inc.* (2d Cir., 1974) 491 F.2d 556.

The only reason the District Court declined to hold an evidentiary hearing and enter findings of fact was because Respondents never raised any factual questions for the District Court to resolve. Respondents never filed any affidavits or declarations with the District Court, and Respondents never produced any witnesses to testify at the hearings on the Orders To Show Cause below. On the other hand, Matson Plastering Co., Inc. did file affidavits with the District Court setting forth those facts in support of its contentions with respect to both Local 295 and Local L-109's strike activity.

Because of Respondents' failure to file any counter affidavits and/or produce witnesses, those facts set forth within the employer's affidavits were uncontested. There

was therefore no need for the District Court to hold an evidentiary hearing or to make findings of fact.

Even if, assuming arguendo, this Honorable Court felt the District Court's injunctions were procedurally defective, such would not preclude review of the Ninth Circuit Court's Opinion. In such an event, Petitioner would ask this Court to first overturn the Ninth Circuit's Opinion by ruling that the District Court has *jurisdiction* (to determine whether the parties intended to exclude the underlying dispute from the arbitration and no-strike provisions of the respective collective bargaining agreements), and then to remand this case to the District Court with instructions to follow whatever procedures are necessary.

III

CONCLUSION

Petitioner, Matson Plastering Co., Inc. respectfully prays that this Honorable Court grant this Petition For Writ Of Certiorari regarding the Ninth Circuit Court of Appeals' December 12, 1980 judgment and April 30, 1981 judgment.

Dated: September 15, 1981.

Respectfully submitted,

THE LAW FIRM OF
THOMAS E. CAMPAGNE
A PROFESSIONAL CORPORATION

By THOMAS E. CAMPAGNE
Attorneys for Petitioner

(Appendices follow)

Amended Appendix G

ARTICLE XIII, TIME FOR PAYMENT TO ALL FUNDS

Section 1. The payments provided for herein are due and payable on or before the tenth (10th) day of the current month and are for hours worked in the preceding month. Contributions shall be made on a reporting form provided by the trustees and must be filled in properly. Payments not received by the twentieth (20th) day of the current month shall thereupon become delinquent and such delinquent employer shall be assessed an amount equal to ten (10%) percent of the delinquent payment, but in no event less than Twenty ($20.00) Dollars per Fund per month as liquidated damages for the additional expense resulting from the delinquency. Postmarks will not be accepted as having been received by the twentieth (20th) day of the current month. Whenever the twentieth (20th) days of the month falls on Saturday, Sunday or holidays, the following business day shall be acceptable as being received. Remittance checks not honored by the bank on the initial deposit for reason of "insufficient funds" shall be considered as non-payment and the employer declared delinquent.

Section 2. For any non-payment of wages, travel pay, fringes and/or assessed penalties, the Union may remove employees from any shop or job of any individual delinquent employer until full payment has been made.

Any employer who is signatory to this Agreement and becomes delinquent in the payment of wages, travel pay,

fringes and/or assessed penalties in another area not covered by this Agreement, the Union may remove employees from any shop or job of any individual delinquent employer, and refuse to furnish employees to said delinquent employer until full payment has been made.

Any employer who becomes signatory to this Agreement and is owing wages, travel pay, fringes and/or assessed penalties in another area not covered by this Agreement, the Union may remove employees from any shop or job of any individual delinquent employer, and refuse to furnish employees to said delinquent employer until full payment has been made.

Section 3. In cases relative to dispute over the payment of wages and/or fringe benefits, at the recommendation of the Joint Conference Board and upon notice in writing from the Joint Conference Board, an individual employer must permit a representative or representatives (including an accountant) of the Joint Conference Board to enter upon the premises of such individual employer during business hours, at all reasonable time or times and to examine and copy reports of such individual employer as may be necessary to determine whether the individual employer is making full and prompt payment of all sums required to be paid by him to the various Trust Funds and/or wages. In the event that such an examination reveals that such employer is not making full and prompt payments of all sums required to be paid by him to the various Trust Funds and/or wages, then, and in that event, such individual employer shall pay such cost, including accountant fees, as may have been reasonably incurred in making such

determination. Upon the written request of the Joint Conference Board of their duly authorized representative, such employer records shall be audited at the office of Trust Fund in question.

Appendix K

There are certain relevant provisions of the Collective Bargaining Agreement. First, the employer relies upon Section 1, Article XIV, which provides as follows:

> "Section 1. During the term of this Agreement and so long as neither party is in violation of any of the provisions of this Agreement, there shall be no strike or lockouts." (Ex. 24)

The Union, however, relies upon those provisions of the Collective Bargaining Agreement which grant the Union a privilege to engage in strike activity under specified conditions:

> "Section 2. For any non-payment of wages, travel pay, fringes and/or assessed penalties, the Union may remove employees from any shop or job of any individual delinquent employer until full payment has been made." (Ex 23)
>
> * * *
>
> "Article XIV (f) Notwithstanding any provisions in the Agreement to the contrary, no dispute, complaint or grievance arising out of the failure or refusal of an employer to comply with the Union Security and hiring hall, wages, transportation, health and welfare, pension, vacation, fringe benefits or other remuneration shall be subject to the grievance or arbitration provisions of this contract. It shall not be a violation of this Agreement for the Union to withdraw its members, or to refuse to man any job of an employer who fails or refuses to comply with the provisions herein contained and such a withdrawal of members or refusal to man the job shall not be a strike or work stoppage within the terms of this Agreement (Ex 25)

Within these provisions of the Collective Bargaining Agreement, there is no basis, as we shall show below, for the issuance of any injunctive relief against the strike activity.

IV. A BOYS MARKETS INJUNCTION MAY NOT ISSUE WHERE THE DISPUTE IS NOT SUBJECT TO THE GRIEVANCE PROCEDURE

* * *